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No. 2381

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

NORTHERN PACIFIC RAILWAY
COMPANY, A Corporation,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District
Court of the Western District of Washington,
Southern Division.

FILED

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Attorneys for Defendant in Error. [2*]

*In the United States District Court for the Western
District of Washington, Southern Division.*

UNITED STATES OF AMERICA, No. 1399.

Plaintiff, Stipula-
tion for

vs.

NORTHERN PACIFIC RAIL- Transcript

WAY COMPANY, a corporation, on Writ

Defendant. of Error.

*Page-number appearing at foot of page of original certified type-written Transcript of Record.

IT IS HEREBY STIPULATED AND AGREED that the following papers shall constitute the record on write of error in the above entitled cause, on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and that in preparing said transcript, the clerk shall, omit all captions, verifications, acceptances of service and other endorsements, excepting file marks, and that said transcript be printed, pursuant to the rules of the Circuit Court of Appeals:—

- 1.—This stipulation;
- 2.—Complaint;
- 3.—Answer;
- 4.—Record of trial;
- 5.—Verdict;
- 6.—Judgment;
- 7.—Order extending time for bill of exceptions;
- 8.—Bill of Exceptions and order settling;
- 9.—Assignments of error.
- 10.—Petition for Writ of error and allowance;
- 11.—Writ of Error;
- 12.—Citation.

CLAY ALLEN and MONROE C. LIST,
Attorneys for Plaintiff.

GEO. T. REID, J. W. QUICK and
L. B. DA PONTE,

Attorneys for Defendant.

[Endorsed]: “Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 29, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.” [3]

Complaint.

Now comes the United States of America, by C. F. Riddell United States Attorney for the Western District of Washington, and brings this action on behalf of the United States against the Northern Pacific Railway Company, a corporation organized and doing business under the laws of the State of Wisconsin, and having an office and place of business at Tacoma, in the State of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, having required and permitted its certain conductor and employee, to-wit: Thos. Doyle, to be and remain on duty as such upon its line of railroad at and between the stations of Portland, in the State of Oregon, and Tacoma, in the State of Washington, within the jurisdiction of this Court, for sixteen hours in the aggregate during the twenty-four-

hour beginning at the hour of 1:10 o'clock, P. M., on May 12, 1913, to-wit: from said hour of 1:10 o'clock, P. M., on said date, to the hour of 12:30 o'clock, A. M., on May 13, 1913, and [4] from the hour of 6:55 o'clock, A. M., on May 13, 1913, to the hour of 11:15 o'clock, A. M., on May 13, 1913, did then and there require and permit said employee to remain and continue on duty as aforesaid until the hour of 1:00 o'clock, P. M., on May 13, 1913, and when said employee had not had at least eight consecutive hours off duty, as required by said Act.

Plaintiff further alleges that said employee, while required and permitted to remain and continue on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees

thereon," approved March 4, 1907, (contained in 34 Statutes at Large, page 1415), said defendant, having required and permitted its certain trainman and employee, to wit: B. L. Eddy, to be and remain on duty as such upon its line of railroad at and between the stations of Portland, in the State of Oregon, and Tacoma, in the State of Washington, within the jurisdiction of this court, for [5] sixteen hours in the aggregate during the twenty-four-hour period beginning at the hour of 1:10 o'clock, P. M., on May 12, 1913, to wit: from said hour of 1:10 o'clock P. M., on said date, to the hour of 12:30 o'clock, A. M., on May 13, 1913, and from the hour of 6:55 o'clock, A. M., on May 13, 1913, to the hour of 11:15 o'clock, A. M., on May 13, 1913, did then and there require and permit said employee to remain and continue on duty as aforesaid until the hour of 1:00 o'clock, P. M., on May 13, 1913, and when said employee had not had at least eight consecutive hours off duty, as required by said Act.

Plaintiff further alleges that said employee, while required and permitted to remain and continue on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, having required and permitted its certain trainman and employee, to wit: W. D. Edgerton, to be and remain on [6] duty as such upon its line of railroad at and between the stations of Portland, in the State of Oregon, and Tacoma, in the State of Washington, within the jurisdiction of this court, for sixteen hours in the aggregate during the twenty-four-hour period beginning at the hour of 1:00 o'clock, P. M., on May 12, 1913, to wit: from said hour of 1:00 o'clock, P. M., on said date, to the hour of 12:30 o'clock, A. M., on May 13, 1913, and from the hour of 6:55 o'clock, A. M., on May 13, 1913, to the hour of 11:15 o'clock, A. M., on May 13, 1913, did then and there require and permit said employee to remain and continue on duty as aforesaid until the hour of 1:00 o'clock, P. M., on May 13, 1913, and when said employee had not had at least eight consecutive hours off duty, as required by said Act.

Plaintiff further alleges that said employee, while required and permitted to remain and continue on

duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant *is* liable to plaintiff in the sum of five hundred dollars.

WHEREFORE, plaintiff prays judgment against defendant in the sum of one thousand five hundred dollars and its costs herein expended.

C. F. RIDDELL, United States Attorney.

E. B. BROCKWAY, Asst. United States Atty.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Aug. 16, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [7]

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff alleges as follows:

I.

For answer to the first cause of action therein the defendant admits the allegations thereof save and except the allegation that said employee while required and permitted to remain and continue on duty as aforesaid was engaged in and connected with the movement of said defendant's train No. 308, and also the allegation that said defendant is liable to the plaintiff in the sum of \$500.00, which said allegations are denied.

II.

Defendant for answer to plaintiff's second cause of action admits the allegations therein contained save and except the allegation that said employe while engaged and permitted to remain and continue on duty as aforesaid was engaged in and connected with the movement of said defendant's train No. 308, and also the allegation that said defendant is liable to plaintiff in the sum of \$500.00, which allegations are denied.

III.

Defendant further answer to plaintiff's third cause of action admits the allegations therein contained save and except the allegation that said employe while engaged and permitted to remain and continue on duty as aforesaid was engaged in and connected with the movement of said defendant's train No. 308, and also the allegation that said defendant is liable to the plaintiff in the sum of \$500.00, [8] which allegations are denied.

AFFIRMATIVE DEFENSE.

Defendant for an affirmative defense to plaintiff's three causes of action alleges that the employes therein named were the conductor and brakeman, who regularly ran defendant's passenger train No. 333 from Tacoma, Washington, to Portland, Oregon, which train was due to leave Tacoma at 1:40 p. m., and due to arrive at Portland at 6:45 p. m. of the same day, and that said train crew on their regular run were due to leave Portland, Oregon on passenger train No. 308, due to leave Portland

at 7:25 a. m. and arrive in Tacoma at 12:35 p. m. the same day.

Defendant alleges that the tracks of this defendant, from Tacoma, Washington, to Portland, Oregon, at the times herein mentioned, were also used by the Oregon-Washington Railroad & Navigation Company for the operation of its trains, and that on the afternoon of the 12th day of May, 1913, passenger train No. 362 of said Oregon-Washington Railroad & Navigation Company was derailed between the stations of South Tacoma and Lakeview, Washington, and by reason of said derailment, the railway tracks were torn up so that it became and was necessary to transfer train crews and *apssengers* at the point of said wreck.

That the crew of this defendant's train No. 333, mentioned in the complaint of the plaintiff, left Tacoma on defendant's regular scheduled run to Portland at 1:40 p. m., May 12, 1913, but when said train reached the point where the tracks had been torn up by reason of the wreck of train No. 362, said train No. 333 was detained and the [9] crew and passengers thereof transferred to defendant's train No. 314, and by reason of said wreck, said train crew did not reach Portland until 12:30 a. m. of May 13, 1913; that said crew left Portland on defendant's regular scheduled run on train No. 308 at 7:25 a. m., May 13, 1913, and by reason of the casualty and unavoidable accident caused by the wreck of said train No. 362, the train crew mentioned in the complaint of the plaintiff was on duty a total of seventeen hours and twenty-five minutes, as in said complaint alleged; that the same was

caused by the casualty and unavoidable accident growing out of said wreck.

WHEREFORE, defendant prays that defendant's plea of not guilty herein be sustained, and that it go hence without day.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for defendant.

(Verification)

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 4, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [10]

Record of Trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION, AT THE CITY OF TACOMA,
BEFORE THE HONORABLE EDWARD E. CUSHMAN,
U. S. DISTRICT JUDGE, PRESIDING, ON TUESDAY,
THE SECOND DAY OF DECEMBER, 1913,
AMONG OTHERS THE FOLLOWING PROCEEDINGS
WERE HAD:—

This cause coming on regularly at this time for trial, the plaintiff being present by Messrs. Clay Allen and Monroe C. List, and the defendant appearing by J. W. Quick, Esquire, a jury being ordered, the following named persons were called, sworn, examined and empanelled as the jury in this case:

W. S. Wilder

Robert Pattison

J. B. Comfort

Tom Brewitt

Chas. L. Bozelle

J. P. Nicholson

George Addison

W. R. Patton

Thomas Manners

A. A. Hinz

James Crowley

Harry Bates

whereupon the trial regularly proceeded with the introduction of evidence, oral and documentary, on the part of the plaintiff and defendant, the following witnesses testifying for the Government:

John Franklin Alsop and Thomas Doyle; and the following witness for defendant:

John Franklin Alsop.

Whereupon, at the conclusion of the evidence, the Government moved for directed verdict on three causes of action; motion denied. On motion of defendant for a directed verdict on the three causes of action, the motion was granted, and the jury returned the following verdict, which was ordered filed as the verdict in this case:

“We, the jury empanelled in the above entitled case, find the defendant not guilty as alleged in the first, second [11] and third causes of action, of the complaint filed herein, being instructed so to do by the Court.

TOM BREWITT, Foreman.”

[12]

Verdict.

We, the jury empanelled in the above entitled case, find the defendant not guilty as alleged in the First, Second, and Third causes of Action of

the complaint filed herein, being instructed so to do by the Court.

TOM BREWITT, Foreman.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 2, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [13]

Judgment.

Now on this 2nd day of December, 1913, the above cause coming on for trial in the above entitled court before the Honorable Edward E.ushman, presiding Judge thereof, the plaintiff appearing by Monroe List, special counsel for the plaintiff, and the defendant appearing by J. W. Quick, its attorney, and both parties having introduced their evidence and rested, the plaintiff moved the court to instruct the jury to return a verdict in favor of the plaintiff on each of the three counts contained in the complaint, which motion was by the Court denied.

The defendant thereupon moved the court to instruct the jury to return a verdict in favor of the defendant on each of the three counts contained in the complaint, which motion was by the court sustained, and the jury thereupon, under the instructions of the court, returned a verdict in favor of the defendant, finding the defendant not guilty on each and all of the counts contained in the complaint.

It is, therefore, considered ORDERED and ADJUDGED by the court that the plaintiff take noth-

ing by reason of said action and that the defendant go hence without day.

Dated at Tacoma, Washington, this 27th day of December, 1913.

EDWARD E. CUSHMAN, Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Dec. 30, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [14]

Order.

Upon motion of the United States Attorney;

It appearing that a Stipulation has been entered into in the above entitled cause, granting the plaintiff thirty days from February 2, 1914, in which to file its Bill of Exceptions;

IT IS HEREBY ORDERED, that the plaintiff may have until March 4, 1914, in which to file its Bill of Exceptions.

Dated this 24th day of January, 1914.

EDWARD E. CUSHMAN, Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 24, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [15]

Transcript of Evidence.

BE IT REMEMBERED that heretofore and upon, to-wit, the 2nd day of December, A. D. 1913, this cause came on regularly for hearing before the HON. EDWARD E. CUSHMAN, Judge of the above entitled court, and a jury;

The Plaintiff being represented by its attorneys and counsel, CLAY ALLEN, Esq., and MONROE C. LIST, Esq.; and

The Defendant being represented by its attorneys and counsel, MESSRS. REID, QUICK & DA PONTE.

Whereupon the following proceedings were had and done, to-wit:

Mr. QUICK.—We desire, with consent of counsel for the government, to amend the Affirmative Defence in line 18 by changing the time that the train was due to arrive at Portland. We have alleged at 3:25. It should be 6:45.

The COURT.—You have stipulated regarding it?

Mr. QUICK.—Just orally in Court.

The COURT.—If you will explain the matter to the clerk so it may be noted on the Answer.

Whereupon a statement of the case was made to the jury on behalf of the Plaintiff by Mr. List.

And a statement of the case was made to the jury on behalf of the Defendant by Mr. Quick.

And the Plaintiff, to maintain the issues on its part, introduced the following evidence:

J. L. ALSIP, a witness produced on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION,

(By Mr. List) [16]

Q. What is your name?

A. J. S. Alsip.

Q. What is your business?

A. Chief dispatcher.

Q. For what road?

A. Northern Pacific, Great Northern and O.
& W.

Q. Where do you live,

A. Tacoma.

Q. Is your place of business in Tacoma?

A. Yes, sir.

Q. How long have you lived in Tacoma and how long have you been engaged as dispatcher for the Northern Pacific Railway Company?

A. I have resided in Tacoma four years. I have been chief dispatcher for the Northern Pacific, O. & W. and Great Northern for two years and four months I think it is.

Q. State what your duties are as chief dispatcher.

A. Well, if there are any duties on a railroad that I do not have a hand in, I do not know what they are, but my principal duty is to look after the operation of trains in general.

Q. Does that include trains operating between Tacoma, Washington and Portland Oregon?

A. Yes, sir.

Q. And operating between those points in May 1912?

A. Yes, sir.

Q. How are the records of the movements of those trains kept?

A. On a train sheet.

Q. And by whom was that made?

A. By what is termed trick train dispatchers.

Q. Those men are under your jurisdiction?

A. Yes, sir.

Q. And you have control over them?

A. Yes, sir.

Q. I hand you what purports to be a train sheet of the Northern Pacific Railway Company and ask you to state whether or not that is an official record of the company that is made in the manner in which you have just testified?

A. Yes, sir.

Q. Does it show the movements of trains between Tacoma, Washington and Vancouver, Washington?

A. Yes, it does.

Q. Referring now to the record of train 303 on May 12th, 1913, does that show the movement of that train?

A. Yes, sir.

Q. What time did that train leave Tacoma?

A. The record shows it left Tacoma at 1:40 P. M.

Q. And what time did it arrive at Portland, Oregon?

A. 12:30 A. M. the following morning.

Q. Or May 13th, 1913?

A. Yes, sir.

Q. What kind of a train was that?

A. Passenger train.

Q. Was it a regularly scheduled train?

A. Yes, sir.

Q. How long had that train been on that run—that particular train had been running between Tacoma and Portland?

A. Well, as far as I know, this particular train, it had been known by this number for a great number of years. I would not say positively how many years. [18]

Q. Referring to the train sheet for May 13th, 1913, and more particularly to train No. 308, what time did that train leave Portland, Oregon?

A. The record shows it left Portland at 7:25 A. M.

Q. May 13th, 1913?

A. Yes, sir.

Q. What time did it arrive in Tacoma?

A. It arrived in Tacoma at 1:00 P. M. the same day.

Q. What was the first station *tha* train reached after crossing the state line and coming into the State of Washington?

A. Vancouver.

Q. What time was that?

A. 7:55, departing at 8:00 o'clock.

Q. Who was the conductor of that train?

A. Conductor Doyle.

Q. And his full name?

A. I am not familiar with it, but I know his name is Tommy Doyle, but his full name, I am— (interrupted)

Q. Have you with you the time slip of Mr. Doyle for May 12th and 13th, 1913?

A. I have not.

Mr. LIST.—Those were asked for, Mr. Quick.

Mr. QUICK.—Who would have the time slips?

A. The superintendent's office, but so far as I know, no request was made for the time slips. In

fact, when I started, there had been no request given for the train sheets, but I brought them along, simply as a matter of record.

Mr. QUICK.—What do you want to show?

[19]

Mr. LIST.—I wanted to show the hours of service.

Mr. QUICK.—That train sheet will show the hours of service.

Q. (by Mr. List). Under the rules of your company, what time on May 12th, was Mr. Doyle required to report for duty?

A. Thirty minutes before leaving.

Q. Was that rule also in effect with respect to the train coming up from Portland to Tacoma?

A. Yes, sir.

Q. That is what is known as the preparatory time?

A. Yes, sir.

CROSS EXAMINATION,

(By Mr. Quick)

Q. Does your train sheet show any delay to train Number 303?

A. Yes, sir.

Q. What engine was pulling 303?

A. Leaving Tacoma?

Q. Yes.

A. 215

Q. What does it show as to delay?

A. It shows a delay of two hours and eleven minutes at South Tacoma and a delay of two hours and twenty-one minutes transferring with train

Number 314 at the point of accident, about a mile and a half of Lake View, or a total delay of four hours and twenty-five minutes, I think it would be.

Q. What was the cause of that delay?

A. That delay was on account of the O. W. R. & N. train Number 362 being derailed at a point about a mile and a half east of Lake View at about 1:50 P. M. [20]

The COURT.—North?

Mr. QUICK.—It is east and west on railroad parlance.

The WITNESS.—Geographically north.

Q. (By Mr. Quick). That is between Lake View and South Tacoma?

A. Yes, sir.

Q. Did that wreck of the O. & W. train tear up the track?

A. Yes, sir.

Q. How long was the track in a condition to prevent the passage of trains?

A. I would not be positive without looking it up, but it seems that it was about seven—let us see, maybe I can tell by this train sheet—I would say, without going into it very thoroughly, about 9:00 o'clock, and then passable along a track which had been built around the derailed cars and engine.

Q. It necessitated the building of a temporary track around this wreck?

A. Yes, sir.

Q. And then what was done with the crew and passengers of train 303 at that point? Did they go on through to Portland?

A. They were instructed to transfer with train

314 that arrived at the wreck, that is coming from Portland to Tacoma, and the crew that left Tacoma went over to the other side of the track and took charge of the train and equipment of Number 314 and proceed to Portland; the crew that arrived at the point of accident on Number 314 came over and took charge of the equipment of 303 which had left Tacoma, and return to Tacoma with it and the [21] passengers from Portland—in other words, the passengers and the crew transferred.

Q. What time did Mr. Doyle and the crew and the equipment of 314 to which they had transferred get to Portland?

A. 12:30 A. M.

Q. And was his regularly scheduled run, for his crew, then back on 308 the following morning?

A. It was.

Q. And that had been the regular run for that crew for how long, if you know?

A. Well, so far as I know, for a great number of years, at least since I have been here for four years.

Q. That is, they would go down on 303 and come back on 308?

A. Yes, with the possible exception that occasionally, for personal reasons, Mr. Doyle and the other crew would change. It was permissible on application to the superintendent, but generally speaking, that was his run for years and years.

Q. Now, what effect did this wreck of the O. & W. have on train service?

A. It simply demoralized the service. We had a great number of passenger trains coming close to

the wreck that it was necessary to take care of one way or another, and who were working at the wreck—it was a single track and it was necessary to build a track around it, and necessary at the same time, to as soon as possible relieve the situation and transfer the passengers from the derailed train to Tacoma and make special provisions for their care and the injured persons,—there were, I believe, five persons killed and [22] generally speaking, we were just about as busy as we possibly could be.

Q. What roads operate over this single track line between here and past the wreck?

A. The Northern Pacific, O. & W. and the Great Northern.

Q. And about how many train in twenty-four hours pass there?

A. Well, we have between Tacoma and Portland in twenty-four hours, eleven passenger trains each way.

Q. That would be twenty-two passenger trains?

A. Yes, and in addition to that we have three passenger trains each way that run from Tacoma to Lake View and branch off at Lake View for the Grays Harbor territory, which is past the point of the wreck.

Q. That would make six more?

A. That would make six more trains—passenger trains.

Q. Were there a number of freights in addition to that?

A. Yes, local freight trains.

Q. And did the dispatchers office here have to make provision for all of those trains?

A. Yes, sir.

Q. And this provision had to be made by reason of this wreck?

A. Yes, sir.

Q. And it changed your entire schedule?

A. We had to take care of the emergencies that came along for all trains.

Q. And this delay of 303 was occasioned then by that wreck?

A. Yes, sir.

RE-DIRECT EXAMINATION,

(By Mr. List)

Q. What time was Number 303 stopped on account of the wreck? [23]

A. What time was 303 stopped or delayed on account of the wreck?

Q. Yes, when it first ran into the wreck.

A. Had the operation not been interfered with by the wreck, they would have met this train that was derailed at South Tacoma. They were waiting at South Tacoma for their arrival, Number 303 arrived at South Tacoma at 1:56 P. M. and the wreck occurred about 1:50. They would probably not have been delayed over two or three minutes at South Tacoma.

Q. What time did Number 303 start on its way to Portland after getting clear of the wreck?

A. What time did they finish transferring do you mean?

Q. Yes, starting to Portland?

A. After transferring the passengers they left Lake View at 6:28 P. M.

Q. After leaving Lake View, did they keep their schedule run or did they run behind time from that point to Portland?

A. After leaving Lake View they necessarily lost time for the reason that the train, engine and the equipment they had transferred to necessarily had to back up to a place near Centralia; therefore, they were not in a position to maintain schedule time.

Q. What was the schedule running time of that train from Lake View to Portland?

A. I have not the time card here.

Q. I hand you a time card and ask you to state the schedule running time of that train from Lake View to Portland.

A. (Examining paper) It would be 4:40 [24]

Q. So, before that train go to Portland, it was known to the official of the company, wasn't it, that they could not get their eight hours rest and return on the regular train?

A. It was known by the time they arrived in Portland, yes, that they would not get their eight hours rest at Portland.

Q. And was it also known that if they did return on their regular train that the sixteen hour period of aggregate service would have expired before they got in at Tacoma?

A. I am not sure just what time they consumed going down, but the returning time if they had maintained their schedule, would have been five hours and ten minutes, that added to your time

as shown there, would show whether or not it could have been made.

Q. The schedule running time is five hours and ten minutes. They would not have run ahead of the scheduled time?

A. No, sir.

Q. So, noting the time they had been on duty when they got in to Portland, adding that to the schedule time, the officials knew they could not get into Tacoma and be within the sixteen hours?

A. Yes, sir.

Q. Knowing that, was any effort made to send another crew out on 308 from Portland to Tacoma?

A. No, sir.

Q. Was any effort made to relieve that crew on 308 at a point where there was reason to believe that the sixteen hour period would be up?

A. No, sir.

RE-CROSS EXAMINATION,

(By Mr. Quick) [25]

Q. Why do you say it was known by the officials here that they would be out more than sixteen hours? Do you know whether it was checked up or whether they had time to check up or not?

A. I do not say that it was checked up. I say the figures show it. It could have been known or would have been known if it had been checked up.

Q. Do you know whether or not they had opportunity to check it up under the conditions?

A. As I understand it, the night chief, in handling the matter overlooked the fact that Mr. Doyle would not have time to return to Tacoma.

Q. He was not on duty at the time the train left Portland or during the night, but the night chief, as I understand it, explained—(interrupted)

Mr. LIST.—Never mind what he explained.

Q. (By Mr. Quick) Was the night chief tied up with his work during the night similar to what you had been doing in the day?

A. Yes, he must have been, because I was as busy as I could be, and I probably worked until 10:30 or 11:00 o'clock that night before I could go home. Ordinarily I left between 6:00 and 6:30, not later than 7:00.

Q. Was the additional work entailed by reason of this wreck?

A. Yes, sir.

(Witness excused) [26]

THOMAS DOYLE, a witness produced on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION,

(By Mr. List)

Q. What is your name?

A. Thomas Doyle.

Q. How are you employed?

A. As a conductor on the Northern Pacific.

Q. What kind of service, freight or passenger?

A. Passenger.

Q. How were you employed last May in passenger service, running between what points?

A. Between Tacoma and Portland.

Q. How long have you been employed as a passenger conductor by the Northern Pacific Railway Company?

A. Since 1891.

Q. And how long running between these points?

A. I have not exactly the dates, but it is somewhere in the neighborhood of fifteen or twenty years, perhaps.

Q. Were you the conductor on the train known as 303 running from Tacoma, Washington, to Portland, Oregon, on May 12th, 1913?

A. Yes, sir. Q. And were you also the conductor on the train running from Portland to Tacoma known as 308 the next day?

A. Yes, sir. Q. Who were your brakemen on that trip?

A. Yes, sir.

Q. Who were your brakemen?

A. Mr. Eddy and Mr. Edgerton.

Q. Were they with you on both trains? [27]

A. Yes, sir.

Q. How long had they been running with you on both trains?

A. Well, it has been,—Edgerton has been with me four or five years, the other man perhaps six or eight months.

Q. On those particular trains?

A. Yes, sir.

Q. What was the initial terminal of train 303?

A. Portland.

Q. And its other terminal?

A. Tacoma.

Q. What was the initial terminal of Number 308?

A. The same, from Portland to Tacoma.

Q. The initial terminal Portland and the final terminal Tacoma?

A. Yes, sir.

Q. What time did you report for duty on May 12th, 1913?

A. In the afternoon, perhaps somewhere after 1:00 o'clock.

Q. The train was scheduled to leave—

A. At 1:40.

Q. What time do you report for duty?

A. At 1:10. I do not know as I reported for duty at 1:10.

Q. You report sometime prior to the departure of the train?

A. Yes, sir.

Q. Did that rule apply to your brakemen, Eddy and Edgerton?

A. Yes, sir.

Q. Did they report with you at that time so far as you know?

A. Yes, so far as I know.

Q. Now, you were in continual service on your train from Tacoma to Portland at that time?

A. Yes, sir. [28]

Q. And also the two brakemen?

A. Yes, sir.

Q. What time did you report for duty at Portland on your return trip the next day on 308?

A. I would say about 7:00 o'clock. We were scheduled out of there at 7:35.

Q. Along about 6:58 or 7:00 o'clock?

A. Somewhere along there.

Q. Those were your regular runs?

A. Yes, sir.

Q. Did you ever receive a call to go out on these trains or did you simply report?

A. We simply reported, they have no call boy in Portland.

Q. I will ask you to state what is the practise of running a scheduled passenger train. Has it any right to exceed the scheduled running time?

A. No, sir.

Q. And so when you left Portland at a certain time, you knew you were going to be on duty at least the scheduled running time on that train?

A. Yes, sir.

Q. Were you relieved from duty on 308 at any place between Portland and Tacoma?

A. No, sir.

Q. Was either of your brakemen relieved from duty on that train?

A. No, sir.

CROSS EXAMINATION,

(By Mr. Quick)

Q. You say you have been a passenger conductor for over twenty years? [29]

A. Since 1891, yes, sir.

Q. And been on this run for fifteen or twenty years, I believe you said?

A. Yes, sir.

Q. And are you familiar with the hours of service law, the federal law?

A. Yes, sir.

Q. And what delayed you on this run on 303?

Mr. LIST.—We will admit that they delay was due to an unavoidable accident at South Tacoma.

Mr. QUICK.—All right.

Q. Have you any instructions, from your superiors as to what to do in regard to the sixteen hour law?

A. Yes, sir.

Q. And what are your instructions?

A. Well, they are put out in the way of a bulletin explaining the hours we shall work and when we shall be released.

Q. What does it require you to do, to warn you against exceeding—(interrupted)

A. Yes, we are warned against exceeding the sixteen hour law, that is, working over sixteen hours.

Q. And did you report to the dispatcher or any of your superior officers the length of time you would be out on this run?

A. No, sir.

Q. Or call for relief?

A. No, sir.

Q. Did it occur to you that you would be out?

A. I never thought a thing about it. It never occurred to me at all. [30]

Q. It did not come to your attention until after it happened?

A. No, sir, I did not think anything about it until my attention was called to it by the train-master or train dispatcher I think it was.

Q. That was after you got in on 308?

A. It seems to me it was the next day they spoke to me about it; I am not sure about that.

Q. Do you think it was when they were checking up the next they they found out?

A. I think they found it, yes, sir.

RE-DIRECT EXAMINATION,

(By Mr. List)

Q. They had a right at Portland to put another crew on that train and send it out in your place?

A. Yes, they had a right to if they—(interrupted)

Q. And you received no message notifying you to lay off and take your required rest?

A. No, sir.

Q. And they could have relieved you possibly at some point up the line?

A. I do not know hardly how they could get a crew out there.

Q. Did they have a right to do that?

A. I could not answer that. I do not think—there was no train out there in time to get a crew out to relieve us.

Q. I am asking you if they had a right. Was there any effort made to do it?

A. No, sir, there was no effort made to do it.

Q. Did they have a right to do it?

A. Yes, they had a right to do it. They have a right to relieve me anywheres.

(Witness excused)

PLAINTIFF RESTS. [31]

2:00 P. M.

And the Defendant to maintain the issues on its part introduced the following evidence:

J. F. ALSIP, a witness heretofore sworn on behalf of Plaintiff, now being recalled on behalf of Defendant, testified as follows:

DIRECT EXAMINATION,

(By Mr. Quick)

Q. I just wanted to ask Mr. Alsip another question. Mr. Alsip, was the circumstances relating to the handling of this particular train and train crew and the schedule time it was in service reported to the government right away?

A. Yes, sir.

Q. That is always done where there is an employee kept over the sixteen hours?

A. Yes, whether it is excusable or not, we make a report.

Q. Whether it is excusable or not, a report is made to the government?

A. Yes, sir.

(Witness excused)

DEFENDANT RESTS.

Mr. LIST.—I move the Court for a directed verdict for the government upon each count, being three counts altogether, the evidence having resolved itself into a question of law as to the construction of the hours of service act.

The COURT.—Motion for directed verdict on the part of the government denied.

Exception allowed. [32]

Mr. QUICK.—At this time, we will openly, in open court, make a motion to instruct the jury to return a verdict in favor of the defendant.

The COURT.—The Court will instruct a verdict for the defendant on each of the counts.

Mr. LIST.—The government desires to except to the refusal of the court to peremptorily instruct the jury to return a verdict for the plaintiff on the first, second and third causes of action.

The government desires to except to the action of the court in directing a verdict for the defendant upon the first, second and third causes of action.

Exceptions allowed.

(Verdict signed and returned in open court).

[33]

STATE OF WASHINGTON, }
County of Pierce. } ss.

I, Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, and the Judge before whom the foregoing case of United States of America, plaintiff, v. Northern Pacific Railway Company, defendant, was heard and tried, do hereby certify that the matters and proceedings embodied in the foregoing Transcript of Evidence are matters and proceedings occurring in the said cause, and that the same are hereby made a part of the record therein; and I further certify that the said Transcript of Evidence, together with all of the Exhibits and other written evidence on file in said cause, and attached to said Transcript of Evidence, contains all the material facts, matters and proceedings heretofore occurring in the said cause and not already a part of the record therein; that said

Transcript of Evidence, with the Exhibits attached thereto, are hereby made a part of the record in said cause, the Clerk of this Court being hereby instructed to attach all the Exhibits thereto.

Counsel for the respective parties being present and concurring herein, I have this day signed this statement of facts.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day of February, A. D. 1914.

EDWARD E. CUSHMAN, Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [34]

Assignment of Errors.

The plaintiff in this action, in connection with its petition for a Writ of Error, makes the following assignment of errors, which it avers occurred upon the trial of the case, to wit:

1.

The Court erred in refusing to peremptorily instruct the jury to find for the plaintiff on the first, second and third causes of action of plaintiff's complaint, as was requested by counsel for plaintiff at the conclusion of the taking of testimony in the case.

2.

The Court erred in peremptorily instructing the jury to find for the defendant on the first, second and third causes of action of plaintiff's complaint, which request for such peremptory instruction was

made by counsel for defendant at the conclusion of the taking of testimony in the case.

3.

The Court erred in entering final judgment against the plaintiff and dismissal of this action.

CLAY ALLEN,
MONROE C. LIST,
Attorneys for Plaintiff.

[35]

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [36]

Petition for Writ of Error.

The plaintiff above named, The United States of America, feeling itself aggrieved by the judgment of the Court, made and entered in this cause on the 30th day of December, 1913, herein, comes now by its attorneys, Clay Allen and Monroe C. List, and petitions this Court for an order allowing it to prosecute a Writ of Error to the Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided.

CLAY ALLEN,
MONROE C. LIST,
Attorneys for Plaintiff.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [37]

Order Allowing Writ of Error.

Upon the motion of Clay Allen and Monroe C. List, Attorneys for the plaintiff, The United States of America, and upon the filing of petition for Writ of Error and an Assignment of Errors;

IT IS ORDERED, That a Writ of Error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein.

WITNESS THE SIGNATURE OF THE HONORABLE EDWARD E. CUSHMAN, Judge of the above entitled Court, at Tacoma, Washington, this 3 of February, 1914.

EDWARD E. CUSHMAN, Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [38]

*United States Circuit Court of Appeals for the
Ninth Circuit.*

THE UNITED STATES OF AMERICA, }
Ninth Judicial Circuit, } ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable Judge of the District Court of the United States for the Western District of Washington,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court, before you, or some of

you, between The United States of America, plaintiff, and the Northern Pacific Railway Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said The United States of America, plaintiff, as by this complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said circuit, within thirty days from date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice [39] of the United States, this 3rd day of February, 1914, A. D., and in the one hundred and thirty-eighth year of the Independence of the United States of America.

(SEAL) FRANK L. CROSBY,
Clerk of the District Court of the
United States for the Western Dis-
trict of Washington.

By E. C. ELLINGTON, Deputy.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [40]

Citation.

THE UNITED STATES OF AMERICA, }
Ninth Judicial Circuit, } ss.

To the Northern Pacific Railway Company, a corporation, and Messrs. Reid, Quick & Da Ponte, its attorneys,

GREETING:—

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said circuit, on the 5th day of May, 1914, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the Western District of Washington, wherein the United States of America is plaintiff in error and the Northern Pacific Railway Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 3rd day of [41] February, 1914, and

in the one hundred and thirty-eighth year of the Independence of the United States of America.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [42]

Certificate of Clerk.

UNITED STATES OF AMERICA, }
Western District of Washington. } ss.

I, FRANK L. CROSBY, Clerk of the United States District of Washington, do hereby certify that the foregoing and attached are a true and correct copy of the record and proceedings in the case of UNITED STATES OF AMERICA vs. NORTHERN PACIFIC RAILWAY COMPANY, a corporation, lately pending in this court, as required by the stipulation of counsel filed in said cause, as the original thereof appear on file in said court, at the City of Tacoma, in said District.

And I do further certify that I hereto attach and herewith transmit the original Writ of Error and Citation.

And I further certify that the cost of preparing and certifying the foregoing record is the sum of \$24.70 which amount will be reported by me as an earning in the cost bill to the Government for the quarter ending March 31st, 1914.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the

City of Tacoma, in said District, this sixteenth day of February, A. D. 1914.

(SEAL) FRANK L. CROSBY, Clerk.

By E. C. ELLINGTON, Deputy Clerk.

[43]

United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, }
Ninth Judicial Circuit, } ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable Judge of the District Court of the United States for the Western District of Washington,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court, before you, or some of you, between The United States of America, plaintiff, and the Northern Pacific Railway Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said The United States of America, plaintiff, as by this complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at

San Francisco, in said circuit, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice [44] of the United States, this 3rd day of February, 1914, A. D., and in the one hundred and thirty-eighth year of the Independence of the United States of America.

FRANK L. CROSBY,
 (SEAL) Clerk of the District Court of the
 United States for the Western
 District of Washington.
 By E. C. ELLINGTON, Deputy.

[45]

No. 1399.

*In the District Court of the United States for the
 Western District of Washington
 Tacoma*

UNITED STATES OF AMERICA,
 Plaintiff in Error,

vs.

NORTHERN PACIFIC RY. CO.,
 Defendant in Error.

Writ of Error.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division,

Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [46]

United States Circuit Court of Appeals for the Ninth Circuit Court.

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

v.

No. 1399

NORTHERN PACIFIC RAILWAY

COMPANY, a corporation,

Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA }
Ninth Judicial Circuit. } ss.

To the Northern Pacific Railway Company, a corporation, and Messrs. Reid, Quick & DePonte, its attorneys,

GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said circuit, on the 5th day of March, 1914, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the Western District of Washington, wherein the United States of America is plaintiff in error and the Northern Pacific Railway Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 3rd day of [47] February, 1914, and in the one hundred and thirty-eighth year of the Independence of the United States of America.

EDWARD E. CUSHMAN,
United States District Judge.

[48]

No. 1399.

*In the District Court of the United States for the
Western District of Washington*

UNITED STATES OF AMERICA,

Plaintiff,

v.

NORTHERN PACIFIC RAILWAY
COMPANY,

Defendant.

Citation.

Received a copy of the within Citation the 3 day of Feb. 1914.

J. W. QUICK,
Atty. for Defendant.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [49]

[Endorsed]: No. 2381. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs.

Northern Pacific Railway Company, a corporation,
Defendant in Error. Transcript of Record upon
Write of Error to the United States District Court
of the Western District of Washington, Southern
Division. Received and filed February 19, 1914.
Frank D. Monckton, Clerk. By Meredith Sawyer,
Deputy Clerk.

